(35)

No. 98-1189

IN THE

Supreme Court of the United States

BOARD OF REGENTS, UNIVERSITY OF WISCONSIN, et al.

Petitioner,

—v.—

SOUTHWORTH, SCOTT, et. al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE, STUDENT RIGHTS LAW CENTER, INC., IN SUPPORT OF NEITHER PARTY URGING REVERSAL

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I, Mitchel D. Grotch, a Member of the Bar of the Supreme Court of the United States, submit

1. I make this motion on behalf of *amicus* Student Rights Law Center, Inc. for leave of court to accept *amicus curiae* brief on consent out of time, served on the court and parties on June 25, 1999.

2. Written consent granted by petitioner and respondents was previously served upon the Clerk of the Court.

3. The Student Rights Law Center, Inc. (hereafter "SRLC") does not support the legal position of either party, but urges reversal.

4. This motion is made due to mitigating circumstances of the sudden illness of my brother, his untimely death, and the resulting delay in the final revision to comply with the rules of this Court.

5. The *amicus curiae* SRLC brings to the attention of the Court relevant matter not already brought by the respective parties which will be of considerable help to the Court.

6. I acknowledge and affirm that all parties that are required to be served with this proposed motion have been served.

7. A previous application has been made on June 25, 1999 by movant in this matter and was held in abeyance until conformance with the rules of the Court.

Wherefore, *amicus* SRLC respectfully requests the motion to accept the *amicus* brief on consent out of time be granted.

Dated: August 25, 1999

/s/ MITCHEL D. GROTCH
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BRIEF OF AMICUS CURIAE, STUDENT RIGHTS LAW CENTER, INC.

INTERESTS OF *AMICUS CURIAE*

The Student Rights Law Center is a not-for-profit corporation of the State of New York dedicated in supporting the equal rights of college students and seeking the independence of self-governing student associations. SRLC's interest in the case at bar results from the prospect that federal court intervention will SRLC respectfully submits have counter-productive effects to peaceful self-governing associations on campuses throughout the country. Consent to file amicus curiae has been granted by the parties pursuant to Rule 37(3)(a).[1]

[1] Pursuant to Rule 37(6) the undersigned counsel authored and supported the printing of this brief.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari is granted limited to the following question: "Whether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in 'political' speech."

The Seventh Circuit opinion, *Southworth v. Grebe*, 151 F.3d 717 (7th Cir. 1998), if not reversed will have the unintended consequence of promoting dissenters within at-large dissenting organizations. By pitting students against each other in traditional public or limited-public forums of self-governing associations, this Court will inextricably cause dissension within student self-governing organizations, rather than other countervailing values promoted by the First Amendment. "Freedom *not* to associate"—a negative right—is unfounded in the text of the First Amendment to the Constitution. Respondents and the Seventh Circuit by conceding the compelled dues component of *Abood* line of mandated due cases avoids the delicate constitutional balance between religious freedom and political freedom of the First Amendment. See *Id.* 151 F.3d at 724 (II.A.1 (Germaneness)).

I. THE FIRST AMENDMENT OF THE FEDERAL CONSTITUTION, MADE APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT, UNAMBIGUOUSLY PROHIBITS CONGRESS, FROM ABRIDGING PURE SPEECH. THE FIRST AMENDMENT PER SE CAN NEVER BE OFFENDED. INDIVIDUALS ARE OFFENDED BY *PER SE* UNJUST (OR AS APPLIED) LAWS THAT ABRIDGE FREEDOM TO THINK, FREEDOM OF CONSCIENCE, FREEDOM TO WORSHIP, FREEDOM OF SPEECH AND EXPRESSION, FREEDOM OF PRESS, FREEDOM OF ASSOCIATION, FREEDOM OF ASSEMBLY, AND FREEDOM TO PETITION GOVERNING ASSOCIATIONS.

Pure speech is not conduct or action, but "political" speech. As a broad policy, government cannot abridge purely "political" speech. As envisioned by the Seventh Circuit "political" speech contains an element of political advocacy that somehow unconstitutionally negates the present student activity fee for the majority of student associations. This Court has on many occasions considered differently "political" speech protected from government infringement or ostracism where the government must show a legitimate compelling interest. *NAACP v. Button*, 371 U.S. 415 (1963), *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

The original plaintiffs (respondents herein) by invoking the First Amendment on the basis of individual relief seek to tilt the balance in favor of their dissenting political and moral beliefs. In essence their own religious beliefs, morals and world-view shape their "political" speech. Inasmuch as *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), found First Amendment viewpoint discrimination for not funding on-campus student religious newspapers, any issue of the opposite effect of religion or morality in limiting funding for purely "political"

speech is limited by this court even if worthy of briefing on this important point of contention. Cf. *Rosenberger* with denial of certiorari in *Carroll v. Blinken*, 957 F.2d 991 (2d. Cir. 1992) ("*Carroll I*"), *cert. denied*, 506 U.S. 906 (1992) and *Smith v. Regents of the University of California*, 844 P.2d 500 (Cal. 1993), *cert. denied*, 510 U.S. 863 (1993). See also, *Carroll v. Blinken*, 42 F.3d 122 (2d. Cir. 1994) ("*Carroll II*").[2]

This court denied petitions for certiorari[3] in *Smith v. Regents of the University of California*, 844 P.2d 500 (Cal. 1993). In *Smith*, the Calif. Sup. Ct in a similar case as here remanded to the lower state courts on the basis of the *Abood* line of cases, whether expenditures for paper upon which "political" resolutions were written of the Assoc. Students UC- Berkeley Government *per se* should be rebated to conservative dissenting students. Such determinations are doctrinally unsound for courts to determine: (1) what kind of speech is "political," and (2) develop rules for bureaucracies that have the effect of suppressing local political association. It is a delicate balance. Flat rules of law cannot be imposed like a cutout template superimposed upon unanalogous situations that overrides state legislation or programs. Respondents admittedly desire to make other beliefs for which they disagree go away from their view by de-funding them. It is nothing neither more nor less than conformity set to pattern the minority.

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[2] Subsequent to his graduation, plaintiff Carroll became a political aide to a Governor and a political organizer of "Change-NY" wielding power to appoint or defeat appointees or candidates, even education trustees on the basis of their viewpoints.

[3] *Amicus* counsel had occasion to present prior argument that the *Abood* line of cases is not applicable to student associations in a motion for rehearing in *Smith* representing the University of California Student Association.

A. First amendment cannot be offended by state law of shared goverance with popularly elected student-governing associations expending student allocable funds to separate and distinct organizations

Funding is made in accordance with state law, rules and regulations. *Southworth* 151 F.3d at 719-720. Wisconsin is unique of only a few states that provide student-governing associations the legal right of "shared governance." This is the core of our democratic values of self-governing associations. See, De Tocqueville, Democracy in America. Jefferson[4] spoke of the ideal of a free society among a hierarchy of self-governing units: "the elementary republics of the wards, the county republics, the state republics and the Republic of the Union, forming a gradation of authorities." The student governing association is one of those fundamental self-governing associations. Associated Students of Madison is not the petitioner. The Board of Regents is the petitioner before this court. The Regents' legal rights are separate and distinct and often at odds with the purely "political" speech of the Associated Students of Madison ("ASM" acronym as in Seventh Circuit opinion).

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[4] Jefferson also said: "The doctrines of Europe were that men in numerous associations cannot be restrained within the limits of order and justice, except by forces physical and moral wielded over them by authorities independent of their will...We (the founders of the new American democracy) believe that man was a rational animal, endowed by nature with rights and with an innate sense of justice, and that he could be restrained from wrong, and protected in right, by moderate powers, confided to persons of his own choice and held to their duties of dependence on his own will."

B. Student fee is neither authoritarian coercive instrument nor political or religious conformity test but merely practical collection of member dues

Percentage of political funds is neither large nor part of the political campaign process although it might contain elements of political advocacy protected by the First Amendment. Student governing associations in general are being squeezed by both ends-official state authorities from using funds for any interpreted political activities and those from the religious and political right. Argument that government should not subsidize speech is inapposite, for the Associated Students is a free association that happens to receive their own funds from the University of Wisconsin for collection purposes acting as trustee or agent in accordance with state law.

In any type of organization or association there must be some coercion to obtain collection of dues, otherwise the organization becomes inactive. That function was long ago determined to be the public university administration like their counterparts in private colleges and universities serving the same function. An anomaly will occur if public universities are treated differently, while private colleges continue not to be subject to the First Amendment. *Amicus* considers if the decision below is affirmed another anomaly exists for public university students not to receive the benefit of political speech under the First Amendment, while private college students receive the benefit even if not subject to the First Amendment. This is because the *Abood* doctrine is negative in character in positing a negative right for dissenters over and above the majority rule. The communications at stake are varied and multiple, but without material resources there are no Hyde Parks, no soapboxs, no stages, nothing to achieve results guaranteed under the Constitution. See, *Rosenberger*.

Respondents and the Seventh Circuit by conceding the *Abood* mandated dues compulsion component avoids the del-

icate constitutional balance between religious freedom and political freedom of the First Amendment. See *Southworth*, 151 F.3d at 724, II.A.1 (Germaneness). Respondents do not disagree with the idea of a student government *per se*, since ASM was never made a party. As the Seventh Circuit stated: "We need not answer the initial question [legitimate government interest in compelled funding] because the students do not contend that the Regents lack legitimate interest in the compelled funding of the student government or student organizations." *Id.*, at 724. This avoided the factual and legal issues at stake: the maintenance of peace and order on campuses since the 1970's by self-governance delegated to officially recognized student governments and lessened over-regulation by campus and state authorities. *But cf.*, *id.*, at 727-728.

The Seventh Circuit on the issue of germaneness found: "Moreover, unlike for example, a political science class on socialism, the International Socialist Organization is only incidentally concerned with education. Its primary goal is the promotion of its ideological beliefs." *Id.*, at 725. The court misses the point. Education encompasses self-respect, dignity, and self-governance. If germaneness is only limited to education for the Univ. of Wisconsin to conduct, then student self-governance and state law of "shared governance" is illusory. Forum of student governing association would encompass more values of self-government envisioned by Jefferson and Madison. The Court went further in limiting germaneness to stultifying lengths: "[t]he mere incantation of the rubric "education" cannot overcome a tactic, repugnant to the Constitution, of requiring objecting students to fund private political and ideological organizations." *Id.*, at 725. The point is distorted for political ideas are not private matters.

II. ABOOD LINE OF CASES HISTORICALLY MISPLACED AND IMPOSSIBLE TO APPLY WITHOUT BEING UNCONSTITUTIONALLY OVERBROAD

This Court in *Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1977), found expenditures for political or ideological "activities" unrelated to collective bargaining agreement could not be compelled against the will of dissenting non-union shop members. Abood held that general allegations of complaint if proved establish a cause of action under the First and Fourteenth Amendment. There was no factual record before this Court in *Abood*.

The student government associations are unlike the unions in *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956), *Machinists v. Street*, 367 U.S. 740 (1961), *Railway Clerks v. Allen*, 373 U.S. 113 (1963), *Abood v. Detroit Board Of Education*, 431 U.S. 209 (1977), *Teachers v. Hudson*, 475 U.S. 292 (1982), *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), *Communications Workers v. Beck*, 487 U.S. 735 (1988), *Lechnert v. Ferris Faculty Assn*, 500 U.S. 507 (1991), *Air Line Pilots v. Miller*, __ U.S. __, 118 S.Ct. 1761, 140 L.Ed.2d 1070 (1998), the bar associations in *Lathrop v. Donohue*, 367 U.S. 820 (1961), *Keller v. State Bar Of California*, 496 U.S. 1 (1990) and *Phillips v. Washington Legal Foundation*, __ U.S. __, 118 S.Ct 1925, 141 L.Ed.2d 174 (1998). The constitutional attack is the State *per se* impermissibly funding third parties. It is a process of shared governance with the Associated Students. Even if assuming *arguendo* the State directly funds third parties or organizations, the political or ideological funding struck down since *Street* has been directed at the *private* union or the *private* bar association union or bar association funding its *own* activities not the petitioner State *per se*.

In *Abood* this court had a general reluctance in granting blanket injunctions in political speech cases. *Street* was more limited than *Hanson* in not relying on strict constitutionality.

The limited issue of "political speech" would suggest the remedial power of the court could conceivably strike down the entire state activity fee as it stands against a small amount of "political" speech though permitting distribution of funds for economic, moral, sexual speech; and on the basis certain religious speech upheld in *Rosenberger* on grounds of viewpoint discrimination. Thus, as framed respondents if successful would achieve an end run around the First Amendment of the Federal Constitution. Thomas Jefferson and James Madison led the fight against the renewal of Virginia's tax levy support of the established church. Madison wrote the *Memorial and Remonstrance*[5] against the churches of the Commonwealth of Virginia.

The two quotations often cited by this Court in the *Abood* line of cases by Jefferson and Madison envisioned a fight against the Establishment of Ecclesiastical Authority. Pure "political" speech has open-ended constitutional protection under the First Amendment, whereas religion can neither be established nor abridged. *Amicus* in reviewing the origin of the repeated cited two quotations by Jefferson[6] and Madi-

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[5] TO THE HONORABLE THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA. A MEMORIAL AND REMONSTRANCE

We, the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill printed by order of the last Session of General Assembly, entitled 'A Bill establishing a provision for teachers of the Christian Religion,' and conceiving that the same, if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State, to remonstrate against it, and to declare the reasons by which we are determined. We remonstruate against the said Bill. Reprinted in *Everson v. Board of Education*, 330 U.S., 63-74. (appendix to dissent of Justice Rutledge).

[6] Preamble to Jefferson's 'Virginia Bill for Religious Liberty' enacted by the Virginia Assembly: 'Almighty God hath created the mind free; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion who being Lord both of body and mind, yet chose not to

son[7] found they arose from this Court's opinions in *Everson v. Board of Education*, 330 US 1 (1947). As Hugo Black said in *Everson*, "the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions." *Id.*, at 12. The establishment clause prohibits religious monopoly.[8] Government does not have a monopoly of ideas and speech is a protected right. It was appropriate for a religious case like *Everson*, since the quotations dealt with propagation of *one official state religion* through the proposed taxation of all other religious denominations. The Establishment Clause ensures that neither the State nor the Federal Government "can pass laws which aid one religion, aid all

propagate it by coercions on either . . . ; *that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical*; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern . . .' Everson, Id., 12-13.(emphasis added). *Abood*, 431 U.S. 209, 234-235 n.31 (1977); *Teachers v. Hudson*, 475 U.S. 292, 305; *Keller*, 496 U.S. 1, 10 (1990); *Southworth*, 151 F.3d 717, 730 (1998).

[7] "Hostility to such compulsion was expressed early in our history. Madison, in his Memorial and Remonstrance Against Religious Assessments, wrote, "Who does not see . . . that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" II Writings of James Madison (Hunt ed. 1901), p. 186. Jefferson in his 1779 Bill for Religious Liberty wrote "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." See 12 Hening's Va. Stat. 85; Brant, Madison, The Nationalist (1948), p. 354." *Machinists v. Street*, 367 U.S. 740, (Douglas dissenting *id.* at 778) (Black dissenting *id.* at 790 n.4); *Abood*, 431 U.S. 209, 235; *Teachers v. Hudson*, 475 U.S. 292, 305; *Keller*, 496 U.S. 1, 10 (1990); *Southworth*, 151 F.3d 717, 730 (1998).

[8] See generally, The Virginia Statute For Religious Freedom, Its Evolution and Consequences in American History, Ed. Peterson and Vaughan, Cambridge University Press, 1988.

religions, or prefer one religion over another." *Id.*, at 15. The clause requires that states be "neutral in * * * [their] relations with groups of religious believers and nonbelievers" *Id.*, at 18. Political speech knows no bounds of governmental neutrality. Rather government prohibits any infringement of speech. *Rosenberger*, *Everson*. Pure political speech has open-ended constitutional protection under the First Amendment, whereas religion cannot be established. Cf. Common Law Writ of Prohibition as a writ against the authority of a judicial officer. Both strike at authority, civil or ecclesiastical authority, for the protection of the individual to guarantee free will, conscience, thought, press.

This is a "political" speech case as limited by order of this Court, except to the extent the *Abood* doctrine is based on the antecedent establishment clause. The Board of Regents of the University of Wisconsin and the Wisconsin State Legislature are not making an official doctrine like the oath, pledge and salute of allegiance struck down by this Court in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). Hundreds of college clubs receive funds voted by and amongst students and their elected and appointed leaders. Not one official party receives all funds—indeed there is a multiplicity of voices in the marketplace of ideas in a university setting. Any group if they so chose could obtain funding. Rather respondents seek to de-fund all others. From a strictly parochial or religious mind-set, all these groups could be lumped together and labeled immoral, political, socialist, communist, homosexual. *NAACP v. Button*, 371 U.S. 415 (1963), *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). Then the respondents would be imposing their own official, moral, or religious church by the very First Amendment they received judicial relief. But cf., *Rosenberger*. It is the substantive relief that is overbroad not merely injunctive relief found by the Seventh Court.

It would be a giant frog-leap in existing jurisprudence under either *Abood* line of cases or *Rosenberger* for students, educators or attorneys to place the First Amendment rights of the majority of students into second place. "For majority has an interest in stating its views without being silenced by dissenters." *Machinists v. Street*, 367 U.S. 740, 773 (1961). Need arbitrators be hired to micro-manage student organizations and student governments, or even as the Seventh Circuit and respondents argue the right to micro-manage the State Board of Regents-an instrumentality of the State itself. It will only be at the expense of public college students in efforts to politically de-fund their "political" and "immoral" speech and to conform to a set religious orthodoxy.

Justices Frankfurter (joined by Harlan) dissenting in *Street* stated: "Is it respectful of the modes of thought of Madison and Jefferson projected into our day to attribute to them the view that the First Amendment must be construed to bar unions from concluding, by due procedural steps, that civil-rights legislation conduces to their interest, thereby prohibiting union funds to be expended to promote passage of such measures?" Id., 367 U.S. 740, 798.

The Seventh Circuit did not hold oral arguments on the constitutional issue of compelled funding. This core constitutional issue left unargued below leaves "political" speech for this court to decide. The result is to limit the constitutional issue and shoehorn the attack on germaneness with an emotional attack against ASM student self-governing association. The Seventh Circuit likens *Southworth* to the *Smith* analysis and concludes, "funding of political and ideological speech of private organizations is not germane to the university's mission." To do so would envelop the student government in a host of never-ending bureaucratic over-regulated litigation

that Justice Harlan warned of in *Railway Clerks v. Allen*, 373 U.S. 113, 131 (1963).[9]

III. ISSUE OF PROPER FORUM CANNOT NEGATE THE FIRST AMENDMENT RIGHT TO ASSOCIATE

Rosenberger decided the limited forum was not the self-governing Univ. of Virginia student governing association, but the monetary fund for which various student groups distributed funds to member organizations. Distribution of funding is not self-executory, but principally made by decisions voted by students and approved by the college administration.

Political advocacy is protected under campaign finance laws to those associations desiring to express any view whether moral, religious, economic, sexual or political in a political campaign subject to donation limits to ward off campaign corruption. *Buckley v. Valeo*, 424 U.S. 1 (1976). Here, germaneness standard has traditionally been assumed to be the province of educators and trustees granted wide range of discretion.

In mandated dues and campaign finance cases prohibition from making contributions is equated with compelled to make (mandated) contributions. The Court in *Abood* said: "The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes

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[9] I do not understand how, consistently with *Street*, the Court can now hold that "it is enough that . . . [a union member] manifests his opposition to any political expenditures by the union" (*ante*, p. 118), or how it can say that in so holding "we are not inconsistent with" what the plurality was at such pains to point out in *Lathrop* (albeit in a constitutional context), *id.*, note 5. The truth of the matter is that the Court has departed from the strict substantive limitations of *Street* and has given them (and, as I see it, also that case's remedial limitations, *compare* 367 U.S., at 772-775, 778-779, 779-780, 796-797, with *ante*, p. 122-123 and Appendix) *an expansive thrust which can hardly fail to increase the volume of this sort of litigation in the future. Id.*, 373 U.S. at 131 (Justice Harlan, concurring and dissenting in part) (1963) (emphasis added).

works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." Id., 431 U.S. 209, 234-235 (1977). *Keller* in quoting from *Abood* wrote: "The Court noted that just as prohibitions on making contributions to organizations for political purposes implicate fundamental First Amendment concerns, see *Buckley v. Valeo*, 424 U.S. 1 (1976), "compelled . . . contributions for political purposes works no less an infringement of . . . constitutional rights." See, Keller, 496 U.S. 1, 9-10 (1990) quoting from *Abood*, 431 U.S at 234. The State is not abridging free will except a small fee to promote funding for student clubs. Tax-exempt status issue is a different issue, but one that has implications for the establishment clause of the First Amendment and the promotion of civil and equal rights. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) and *Allen v. Wright*, 468 U.S. 737 (1984). Unlike public unions, student clubs and organizations are not generally part of the political process or political campaigns. Student organizations use their own funds for pure expression compatible with the free speech clause of the First Amendment.

The Seventh Circuit states in a footnote: "[W]hat good does it do objecting students to work within the democratic process? Even if the objecting students run for, or obtain representation on the ASM, once there they cannot de-fund organizations whose viewpoint they opposed citing Rosenberger." *Southworth*, 151 F.3d at 732 n14. The argument Circuit Judge Manion in his opinion is not an *ad hominem* attack for its attack is against the majoritarian student self-governing association. An explanation lies in the logical extension of the *Abood* doctrine to absurd lengths in support of the minority against the very essence of our constitutional system and the legislative process, the give and take of compromise and majority rule. Respondents benefit by being outsiders, to

have their cake and eat it too. Respondents do not disagree with activities they agree with. It is everyone else's activities that they disagree with that brings them into court to de-fund —every other activity that *Wide Awake* won in *Rosenberger*. This case is reverse *Rosenberger*, if one were to analogize reverse discrimination. See, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

The Seventh Circuit opinion in large part does not use the *Rosenberger* analysis, but the *Abood* and *Keller* analysis, shoehorning mandated dues for students left open by this court in *Rosenberger*. Major distinction must be made between the expenditure of funds for political activities by unions in *Abood* and *Keller* and by students. It is not the University monies it is the students. Unions' expenditures were for their own activities. Respondents attack state expenditures to third party organizations. Expenditures are not made by university but students to other students.

A. State action or forum analysis impacts the freedom of self-governing associations

Point of analysis must start not with state action, but with the real actors—students. *Amicus* seeks to foster as Jefferson said their will unencumbered by authority, by free will, by persuasion and by example. It seems the courts have left the necessary party—the majority of students out of the equation —it is students who practice self-governance.The limited forum analysis was a shortcut in finding viewpoint discrimination in *Rosenberger*. This court's limitation on political speech in the *Abood* line of cases misses the point that respondents seek a moral religious conformity by going beyond what similar students won in *Rosenberger*—funding for a newspaper. Jefferson's exuberant confidence was based on faith in the quality of being human, the human quality of being innately different. When we erase inherently human

qualities for expediency and control we as a society become inhuman.[10] *But cf.*, Amendment X to the Constitution.

The *Abood* doctrine would be unworkable if applied in government. It is unheard of for corporate decision-making to be second-guessed even by owner-shareholders unless by a high threshold in accordance with shareholder derivative action statutes and the business judgment rule. In the case of *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), this Court made it clear that the principles of *Abood* apply equally to employees in the private sector. See, *Keller*, 496 U.S. 1, 10 (1990). *Communication Workers v. Beck*, 487 U.S. 735 (1988). If such a doctrine were applied entirely across the board, no self-governing association could ever be possible. Yet *Abood* is acceptable for *per se* dissenting organizations—unions, bar associations, IOLTA's, and now self-governing student associations. "Freedom not to associate" as a value inextricably functions to cause dissension among its association members. It is not a First Amendment value in the least. The *Abood* doctrine is more restrictive than necessary against the freedom of *per se* dissenting associations, since it is they who truly own their funds, which are just as fungible as monies in business organization. Government or self-governing associations would be at a standstill if individual dissenters obstructed the necessary and proper administration of programs[11].

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10 In concluding his book *Brave New World Revisited*, Aldous Huxley wrote:

> "Meanwhile there is still some freedom left in the world. Many young people, it is true, do not seem to value freedom. But some of us still believe that, without freedom, human beings cannot become fully human and that freedom is therefore supremely valuable. Perhaps the forces that now menace freedom are too strong to be resisted for very long. It is still our duty to do whatever we can to resist them."

Aldous Huxley, *Brave New World Revisited*, Harper & Brothers, 1958, New York, pg. 147.

11 "As James Madison noted, if a bill of rights were 'incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.' 1 Annals of Cong. 439 (1789)." *Valley Forge Christian College v. Americans United For Separation Of Church And State, Inc., et al.* 454 U.S. 464, 494n.6 (1982).

CONCLUSION

The Seventh Circuit decision if upheld will strike a blow at the First Amendment rights of self-governing student associations unalterably leading to campus unrest as had occurred in the 1960's. For it was in that decade that students associated to fight unjust campus and state rules imposed without "shared governance." It was in the 1970's that mandatory student activity fees were established on campus to give students control over their lives and give them some forum in which to realize material goals and results. The promise of *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Bolling v. Sharpe*, 347 U.S. 497 (1954), was a commitment not just to end a dual racially-segregated school system, but a new vision by this Court full of exuberant confidence in the future generations—of our youth—posterity—true societal "free-riders."

There are major doctrinal difficulties with imposing such blanket solutions nationwide on state college campuses and state college students for it is doctrinally, historically, legally, and practically unworkable. Take away student self-government authority, superimpose campus officialdom, or other moral or parochial hierarchy, and all speech will be abridged. We can teach our youth freedom to explore their own potentials with newer technologies or we can fear them by bestowing strict authority and control—official or moral. The only thing that stands in the way in chilling speech is the delicate balance to *our* Constitution.

The volume of litigation spourned by affirming the opinion below will be at the cost of the freedom of association for a majority of student organizations.

Amicus urges reversal of the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully Submitted,

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